

October Term, 1907

No. **400**

J. L. WILKEY AND J. L. WILKEY, ADMINISTRATORS,
INC., a Corporation, Petitioners,

STATE OF ALABAMA,
SMITH AND JIM C. SMITH, Respondents.

PETITION FOR WRIT OF HABEAS CORPUS,
PREMIER OF THE STATE,
SUPPORT PETITION.

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IN THE
SUPREME COURT OF THE UNITED States
October Term, 1943

No.

J. L. WILKEY AND J. L. WILKEY, ADJUSTER,
INC., a Corporation, *Petitioners*,

vs.

STATE OF ALABAMA EX REL., JIM C
SMITH AND JIM C. SMITH, *Respondents*

6th Div. 970

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitions of J. L. Wilkey and J. L. Wilkey, Adjuster, Inc., separately and severally respectfully show to this Honorable Court:

A.
**SUMMARY STATEMENT OF THE
MATTER INVOLVED**

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code as amended (U.S.C.A. Title 28 Section 344 (b)).

This suit originated as a statutory quo warranto proceedings on the law side of the Circuit Court for the Tenth Judicial Circuit of the State of Alabama at Birmingham. (R. pp 4 and 13)

It was brought by the then President of the Birmingham Bar Association for the declared purpose of protecting the law practice from intrusion by unlicensed and unqualified persons (R. 4)

The respondents, petitioners here, were and for many years had been carrying on their business of Independent Insurance Adjusters in the City of Birmingham and adjacent territory.

The proceeding was filed on August 21, 1937. It was triable before a judge and jury.

At the first trial, the trial Court gave affirmative instructions for the complainants below and entered an order of exclusion against the respondents below (petitioners here). This judgment was reversed by the Supreme Court of Alabama (*Wilkey vs. State*, 238 Ala. 121; 189 So. 198).

The case was tried a second time and again the trial Court gave affirmative instructions for the complainants below and entered an order of exclusion against respondents below (petitioners here). This judgment was reversed by the Supreme Court of

Alabama, (*Wilkey v. State*, 238 Ala. 595; 192 So. 588; 129 A.L.R. 549).

On the third and last trial of the case the trial Court again gave affirmative instructions for the complainants below and entered an order of exclusion against the respondents below (petitioners here) (R. 32).

On appeal, the Supreme Court of Alabama affirmed this judgment in an opinion handed down on May 13, 1943 (R. 274). Respondents below (petitioners here) duly filed an application for rehearing on May 26, 1943 (R. 305) which was duly considered by the Supreme Court of Alabama whereupon the said Court extended its former opinion and overruled said application for rehearing and entered a final judgment in the cause on the 30th day of June, 1943 (R. 305). These proceedings were had and done within the time allowed by the Rules of the Supreme Court of Alabama. (Supreme Court Rule 38, Appendix to Title 7, Code of Alabama of 1940, page 1018.)

This opinion and extension thereof complained of are reported and are now available: *Wilkey v. State, ex rel., Smith*, 14 So. (2d) 536. They are inserted as "A" in the Appendix to this petition.

The opinion of the Supreme Court of Alabama turned upon its construction of a statute of Alabama cited as Section 42 Title 46 Code of Alabama 1940 and the validity of which being involved in this proceedings, is inserted as "B" in the Appendix to this petition.

The relief sought in the original petition filed

by complainants below was: (1) That the respondents be commanded to show by what warrant or authority they, separately and severally, are and have been intruding into the profession and practicing said profession of law in Birmingham, Jefferson County, Alabama, and elsewhere in the State: (2) that upon final hearing the respondents separately and severally be excluded or be prohibited from practicing law in this State until such time when they or either of them may become legally licensed to practice law in the State of Alabama.

The respondents below set up the general issue or denial of the allegations of the petition. Throughout each of three trials in the Circuit Court and in each of the three arguments made and briefs filed on appeal in the Supreme Court, petitioners have insisted that to give Section 42 Title 46 Code of Alabama of 1940 the meaning insisted upon by complainants below and now in part given to it by Supreme Court of Alabama would deprive petitioners of their property and freedom without due process of law and deny them the equal protection of the laws. That question was always before the Court and was decided contrary to petitioners insistence as seen by the Court's reference to petitioners' position in its opinion. (See last paragraph, Recod p. 294.)

The judgment rendered by the Court below is in substance as follows (using the Supreme Court's summary):

"* * * * * And it further appearing to the Court that plaintiffs are entitled to such appropriate relief as is germane to the general nature and purposes

of this proceeding in the proper administration of justice and for the general welfare of this State:

"Now, therefore, it is ordered, adjudged and decreed by the Court that the said defendants, J. L. Wilkey and J. L. Wilkey, Inc., a corporation, are now and have been continuously since, to wit: In January, 1932, unlawfully intruding into the profession of the practice of law in Jefferson County, Alabama, and elsewhere in this State, and unlawfully practice law in Jefferson County, Alabama, and elsewhere in this State, including the settling, adjusting or compromising of controverted or disputed claims or demands between persons with neither of whom they are in privity or in the relation of employer and employee in the ordinary sense, which is a profession requiring a license or certificate, or other legal authorization within this State, without having obtained such license or certificate or other legal authorization within this State.

"It is further ordered and adjudged by the Court that the defendants, J. L. Wilkey, Inc., a corporation, their officers, agents, servants or employees, be and they are each, separately and severally, hereby excluded from and prohibited from practicing law in the State of Alabama, including the settling, adjusting or compromising of controverted or disputed claims or demands between persons with neither of whom they are in privity or in the relation of employer and employee in the ordinary sense, until such time when they or either of them, respectively may become licensed to practice law in the State of Alabama" (R. 276).

In its last opinion, in a fair manner, the Supreme Court of Alabama made a summary of the facts, which in such part as we deem material to this petition, we, for convenience, adopt as our statement of facts, viz:

(Quoting from opinion in 14 So. (2d) 536): "A" in Appendix hereto).

"The facts as are necessary to an understanding of this controversery may be summarized as follows:

'J. L. Wilkey is a resident of the City of Birmingham. His business or vocation is that of an independent insurance adjuster of claims for various companies. He has been so engaged in such vocation since 1928. This type of work was carried on by him as an individual until 1932, when J. L. Wilkey, Adjuster, Inc., a corporation, was organized. Wilkey is the owner of twenty-three of the twenty-five shares of stock, is president and treasurer of the corporation and has exercised complete control and supervision over its activities and policies. The objects for which-the corporation was formed as here pertinent are stated in the incorporation declaration to be: (a) To engage in the business of enforcing, securing, settling, adjusting and compromising defaulted, controverted, disputed and denied accounts, claims or demands of every kind, acting solely for persons, firms and corporations with whom said J. L. Wilkey, Adjuster, Inc., is in privity, one or both, or more, or with whom one or both or more said J. L. Wilkey, Adjuster, Inc., sustains the legal relation of employer and employee in the ordinary sense; (b) the corporation shall have no power to practice

law nor act as an attorney. Offices are maintained in the cities of Birmingham, Anniston and Decatur. Neither Wilkey nor anyone else connected with the corporation at the time this case was tried below is licensed to engage in the practice of law in this State, although formerly one of the adjusters was so licensed.

For a number of years the respondent J. L. Wilkey, Adjuster, Inc., has advertised in insurance periodicals as being engaged in the business of investigating and adjusting claims made against insurance companies. The respondents have adjusted many claims made against numerous insurance companies and their assureds. They have not represented claimants trying to collect from insurance companies or individuals. Respondents are not paid a salary by any of the insurance companies which they represent, but are compensated for their services on an hourly and mileage basis. The offices are maintained at the expense of the corporation respondent. All clerical help and employees are employed by the said corporation and the respondent Wilkey is paid a salary by the respondent corporation for his services. Respondents have paid for a number of years the license required by both the State of Alabama and the City of Birmingham for engaging in the business of an insurance adjuster. Prior to the time that this suit was instituted respondents followed the practice of appearing as agents for insurance companies in having consent judgments entered against such companies where suit was brought by next friend in behalf of minors. This practice, however, does not appear to have been followed by respondents since 1936 and they expressly disavowed any intention of resuming such practice.

The evidence shows that respondents rendered services to insurance companies in connection with the following types of claims: Workmen's compensation cases; fire losses; automobile collision (where claim was filed by insured for damage or injury to his automobile as result of collision); automobile liability insurance (where claim was filed by third person based on personal injury or damage to automobile as result of alleged negligence of company's assured). * * * * *

As we interpret the testimony, the procedure and practice usually followed by respondents in investigating, adjusting and settling claims, may be summarized as follows:

(a) Workmen's compensation claims. The respondents were usually notified of the fact that an employee had filed a claim by the local agent of the insurance company or by the employer covered by such insurance. Where the claim was based on minor injuries, the respondents did not make an investigation of the facts incident to the injury, but merely notified the insurance company of the fact that claims had been filed. If notified by the company that the claim should be paid, the respondents drew a draft on the company to cover the amount of the claim. In instances where there was any question as to whether the employee had actually been injured or if the employee had lost time from his job as a result of the injury, the respondents investigated the facts and made a report thereof to the insurance company. Payment was made to the injured employee only upon express authorization or direction of the insurance company. * * * * *

(b) Fire insurance claims. Respondents in-

vestigated the facts incident to the fire losses when requested to do so by the companies and made reports of their findings to the company. Payments were made direct to the policy holder by the company, the respondents not being authorized to draw drafts on such companies.

(c) Automobile collision claims. Claims of this nature were usually forwarded to respondents by agents of insurance companies, but in some instances by the companies. After the claim was forwarded to respondents, they investigated the facts surrounding the accident and obtained from a reliable garage an estimate of the injury or damage to the automobile. This information was sent by respondents to the insurance companies, who usually determined the amount to be paid claimant after taking into consideration and deductible features which may have been included in the policy. * * * * *

(d) Liability insurance. Upon receiving notice from a company or its agent of an accident or injury, the respondents obtained as soon as possible complete information regarding the accident, including the nature and extent of any resulting injuries to persons and damage to property. The information obtained by respondents was forwarded to the insurance companies on forms furnished by the companies. The forms when filled out usually contained information as to the name and address of the claimant, the place where the accident occurred, the time of the accident, the type of automobile involved, the name of the driver, name and address of injured person, extent of injuries, extent of damage to automobile, and other similar information. The report also usually contained the driver's version of the accident, including his

opinion as to its cause. The adjuster's sometimes agreed with the injured party as to the amount of damages, after securing estimate from physician in case of personal injuries and from a garage in case of injuries to an automobile. In some instances respondents drew drafts on the companies for the amount agreed upon and in others they merely delivered to the payee the check sent to them by the company. In a few instances drafts were drawn by the respondents on the insurance company in payment of claims without being specifically directed to do so by the insurance company. In such cases the amount of the claim was small. When a claim was paid, the respondents had the claimant execute a release. The releases were not drawn by respondents but were furnished by the insurance companies. Each insurance company had a different form of release but in most instances they varied only in minor details. Most of the companies used the same form of release for all types of claims, but at least one had different forms for different claims. Respondents selected from the release forms sent to them the one which in their judgment was applicable to the particular type of claims. The form generally used merely called for the insertion therein of the date and place of the accident and the name of the person who receives the check or draft. Where the claimant did not agree to accept the amount offered by the insurance company, the respondents made additional investigation and reported the results thereof to the companies. If the company did not recede from its original stand after the receipt of the additional information, respondents so notified the claimants. In cases where suit resulted, the company and its

local counsel were notified by respondents, who forwarded to local counsel the entire file. The respondents after forwarding the file to the company's local counsel were no longer connected with the matter. * * * * *

There appear to be three types of insurance adjusters, the "claimant adjuster", the "salaried adjuster", and the "independent adjuster".

The "claimant adjuster" is one who, while he may do the things the appellants do, will also obtain, secure, enforce, or establish a right, claim or demand for an individual against an insurance company. That is, he collects as well as pays. His activity is not as an incident of a legitimate business like insurance, but as an independent vocation. He holds himself out to the public as ready to serve all comers. The authorities are practically unanimous in holding that the method of operation of this type of insurance adjuster constitutes the practice of law. One of the leading cases dealing with this type of adjuster is that of *Meunier v. Bernich*, La. App., 170 So. 567, wherein it appears that Meunier, the adjuster, undertook not only to investigate the facts and negotiate for a settlement, but he also advised claimants as to the liability of the tortfeasor and advised them respecting their rights and liabilities as a matter of law. Meunier also by contract reserved the right to place the claims in the hands of a lawyer of his own choosing in event suit was necessary. This course of procedure seems to have been that followed by the adjuster in all of the cases dealing with this type of adjuster. *Fitchette v. Taylor*, 191 Minn. 582, 254 N. W. 910; 94 A. L. R. 356; *Fink et al v. Peden*, 214 Ind. 584, 17

N. E. 2d. 95; *Hightower v. Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97, 86 A.L.R. 509.

The "salaried adjuster" is one who performs the same type of service as do the appellants in this case, but is a full time employee of one insurance company or of two or more separate companies who operate together as a so-called "group", all contributing pro rata to his salary. Only one case has been called to our attention wherein a Court has been called upon to pass upon the question as to whether or not this type of insurance adjuster in performing the usual functions of such an adjuster is engaged in the practice of law. In *Liberty Mutual Insurance Co., et al., v. Jones, et al.*, 344 Mo. 932, 130 S. W. 2d 945; 125 A.L.R. 1149, the Supreme Court of Missouri held that this type of adjuster was not engaged in the practice of law in investigating and reporting facts, and negotiating settlements for his employer.

The "independent insurance adjuster" differs very little in respect to the activities in which he engages from the salaried insurance adjuster. The two types differ only in their method of employment and the method of their payment. One is hired by one company or a number of companies acting as a "group" and is paid by the month, while the other is hired by several companies acting independently, and is paid by the hour and the mile. The Supreme Court of Wisconsin in the case of *State of Wisconsin v. Rice*, 236 Wis. 38, 294 N.W. 550, has held that an independent insurance adjuster is not engaged in the practice of law when investigating and reporting the facts incident to an automobile accident or in negotiating a settlement between the claimant and the insurance company. The

Wisconsin case, *supra*, is the only case from other jurisdictions which has been called to our attention wherein the status of an independent insurance adjuster is discussed.

The appellants, unquestionably, should be classed as "independent insurance adjusters, * * * * *" (R. pp. 278-284).

There have been omitted from the above copied statement of facts references to occasional acts of the respondents below, usually not habitually engaged in or now long since abandoned and in most instances conceded by all parties to constitute the practice of law and not now insisted upon as with- in their rights by petitioners (respondents below).

Subsection (d) of Section 42 Title 46 of the present Code of Alabama with sufficient context to make it intelligible, reads : (See "B" in Appendix hereto for complete Section.)

"Who may practice as attorneys.—Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, * * * * * (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense is practicing law."

The Supreme Court of Alabama in its opinion, a revision of which is here sought, construed this state

statute to permit the "salaried insurance adjuster" as defined by the Court, to settle "defaulted, controverted or disputed" claims and to deny that right to the "independent insurance adjuster", which it held petitioners (respondents below) to be.

In this connection the Court said:

"Before the situation reaches a point where there is a default, dispute or controversy, the law in our opinion provides for adjustment by independent lay adjusters, duly qualified and licensed as such, who may do whatever is necessary to that and not prohibited by subdivisions (a), (b) and (c) of Section 42 Title 46, *supra*. But after a default, dispute or controversy has arisen, the independent lay adjuster must step aside, for then the law declares that the further adjustment or litigation must be handled by a regularly licensed lawyer."

This language alone would leave it slightly uncertain whether the salaried adjuster would, when the claim became disputed or controverted, also have to "step aside" but on rehearing the Court clarified its language by saying further with reference to said subsection (d):

"That section provides that one who adjusts a defaulted, controverted or disputed account, claim or demand between persons with either of whom he is in privity or with whom he stands in the relation of employer and employee in the ordinary sense, is not engaged in the practice of law."

The effect of this holding on application for rehearing is that one class of adjusters, viz, the "salaried adjuster" may settle defaulted, controverted or disputed accounts, claims or demands, while the other class, to which petitioners belong, viz, the "independent insurance adjuster" cannot do so.

The Court then said :

"The appellants contend, however, that if such a construction be placed on the statute, it would deny to them the equal protection of the laws and, therefore, would be unconstitutional. We do not agree with that contention" (R. 294).

B.

Reasons Relied on For The Allowance of The Writ

A review of this cause on certiorari to the said Supreme Court of Alabama is sought for the following reasons:

(1) The Supreme Court of Alabama has decided a federal question of substance in a way not in accord with applicable decisions of this Court. (*Hartford Steam Boiler Inspection and Insurance Company v. Harrison*, 301 U.S. 459; 57 S. Ct. 838; *Allgeyer v. State of Louisiana*, 165 U.S. 590; 41 S. Ct. 832; *New State Ice Company v. Leibman*, 285 U.S. 262; 52 S. Ct. 371; 76 L. Ed. 747.)

(2) The Supreme Court of Alabama has decided a federal question of substance in a way directly contrary to the principle of law established by this Court in the cases cited in (1) above.

(3) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to deny the equal protection of the laws to petitioners in violation of the Fourteenth Amendment of the Constitution of the United States.

(4) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to deprive petitioners of liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to make an arbitrary and unreasonable classification of petitioners and other independent insurance adjusters and under such classification to deny them equal protection of the laws as established by this Court in the case cited in (1) above.

(6) The Supreme Court of Alabama has so construed subdivision (d) Section 42 Title 46 Code of Alabama 1940 as to deprive petitioners and other independent insurance adjusters of liberty and property without due process of law as established by this Court in the decisions cited in (1) above.

(7) The Supreme Court of Alabama in the decision complained of has erroneously held subdivision (d) Section 42 Title 46 Code of Alabama 1940 as construed by said Court to be valid and constitutional.

(8) The decision of the Supreme Court of Alabama here complained of has the effect of authorizing one lay adjuster to settle controverted and dis-

puted insurance claims and to deny that right to another lay adjuster between whom there is no valid basis of distinction as defined in the cases cited in (1) above, all contrary to the Fourteenth Amendment to the Constitution of the United States.

(9) The Supreme Court of Alabama has erroneously and wrongfully denied to petitioners and other independent insurance adjusters the right to follow the vocation of settling and adjusting controverted and disputed insurance claims contrary to the rule established by this Court in the cases cited in (1) above and in violation of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, your petitioners, separately and severally, respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Alabama, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case on its docket numbered *Sixth Division 970* and entitled *J. L. Wilkey and J. L. Wilkey, Adjuster, Inc., a corporation, Appellants, v. State of Alabama, ex rel., Jim C. Smith, and Jim C. Smith, Appellees*, and that the said judgment and decree of the Supreme Court of Alabama may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to

this Honorable Court may seem meet and just, and
your petitioners will ever pray.

J. L. WILKEY,
J. L. WILKEY, INC., a Corporation,

By

J. L. Wilkey
J. L. Wilkey, Its President.

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